Ng Hock Seng & Ors v Kilang Papan Sungei Durian Sdn Bhd & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO D-02(IM)-2241 OF 2011
ABDUL MALIK ISHAK, APANDI ALI AND BALIA YUSOF JJCA
9 FEBRUARY 2012

Civil Procedure — Pleadings — Defence — Extension of time to file — Defendants sought extension of time to file statement of defence more than two years after service of writ of summons — Application prompted by plaintiff's move to enter default judgment — Whether prejudice suffered by plaintiffs due to defendants' inordinate delay could be compensated by costs

The first respondent, a sawmill company, of which the second respondent was its managing director, was given approval by the Kelantan Forestry Department to log timber in an area known as 'Compartment 50'. By an oral agreement, the respondents appointed the appellants as timber contractors for Compartment 50 but the appellants allegedly failed to adequately pay the guarantee sum required and also failed to carry out promised initial works like building the entry road, a bridge and the workers' quarters. Although several months passed since the logging approval was given, no logging activity was carried out because the logging licence had not been obtained. Eventually the approval to log was cancelled and, as a result, the respondents terminated the oral agreement with the appellants. The appellants reacted by allegedly issuing threats against the respondents and bad-mouthing them. The respondents obtained an injunction restraining the appellants from, inter alia, harassing them and their workers and from entering the logging site at Compartment 50. They also sought a declaration that the oral agreement was terminated and that the appellants pay damages for breach of contract and economic loss. More than two years after having served the writ of summons and statement of claim on the appellants, the respondents moved to enter judgment in default. The appellants who had till then failed to file their defence applied to court for extension of time to do so. The application was refused resulting in the instant appeal to the Court of Appeal.

Held, dismissing the appeal with costs and affirming the decision of the High Court:

(1) The appellants' delay in filing their defence was unreasonable. Their application to extend time to file defence prejudiced the respondents. The delay of more than two years entailed hardship for the respondents and the prejudice sustained by the respondents could not be

compensated by costs. The appellants' defaults in carrying out their part of the bargain had seriously undermined the respondents' sawmill operations and escalated the manpower costs (see paras 16–17).

(2) If the appeal were to be allowed it would prejudice the respondents and also be a waste of judicial time and effort and it would add up to the costs. There was also the substantial risk that a fair trial could not be obtained as the relevant witnesses and documents might not be traceable (see para 20).

[Bahasa Malaysia summary

Responden pertama, syarikat kilang papan, yang mana responden kedua adalah pengarah urusannya, diberi kelulusan oleh Jabatan Hutan Kelantan untuk pembalakan di kawasan yang dikenali sebagai 'Compartment 50'. Melalui perjanjian lisan, responden-responden melantik perayu-perayu sebagai kontraktor balak untuk Compartment 50 tetapi perayu-perayu didakwa gagal untuk membayar dengan mencukupi jumlah jaminan yang diperlukan dan juga gagal untuk menjalankan kerja-kerja mula yang dijanjikan seperti membina jalan masuk, jambatan dan kuarters pekerja. Walaupun beberapa bulan telah berlaku semenjak kelulusan pembalakan diberi, tiada aktiviti pembalakan dijalankan kerana lesen pembalakan tidak diperolehi. Akhirnya kelulusan untuk pembalakan dibatalkan dan, akibatnya, responden-responden menamatkan perjanjian lisan dengan perayu-perayu. Perayu-perayu bertindak balas dengan mengeluarkan ancaman terhadap responden-responden dan memburuk-burukkan mereka. Responden-responden memperolehi injunksi menghalang perayu-perayu daripada, antara lain, menggangu mereka dan pekerja-pekerja meraka dan daripada memasuki tapak pembalakan di Compartment 50. Mereka juga memohon perisytiharan bahawa perjanjian lisan ditamatkan dan bahawa perayu-perayu membayar ganti rugi untuk kemungkiran kontrak dan kerugian ekonomi. Lebih dari dua tahun selepas menyerahkan writ saman dan penyata tuntutan ke atas perayu-perayu, responden-responden bertindak untuk memasukkan penghakiman ingkar. Perayu-perayu yang sehingga pada masa itu gagal memfailkan pembelaan mereka memohon kepada mahkamah untuk pelanjutan masa untuk berbuat demikian. Permohonan tersebut ditolak mengakibatkan rayuan ini kepada Mahkamah Rayuan.

Diputuskan, menolak rayuan dengan kos dan mengesahkan keputusan Mahkamah Tinggi:

(1) Kelewatan perayu-perayu untuk memfailkan pembelaan mereka adalah tidak munasabah. Permohonan mereka untuk melanjutkan masa untuk memfailkan pembelaan memprejudiskan responden-responden. Kelewatan lebih dari dua tahun melibatkan kesusahan kepada responden-responden dan prejudis yang dialami oleh responden-responden tidak boleh ditukar dengan kos. Keingkaran

perayu-perayu dalam menjalankan bahagian perjanjian mereka telah secara serius menjejaskan operasi kilang papan responden-responden dan meningkatkan kos tenaga kerja (lihat perenggan 16–17).

(2) Jika rayuan dibenarkan ia akan memprejudiskan responden-responden dan juga menjadi pembaziran masa kehakiman dan usaha dan ia akan menambahkan kos. Juga terdapat risiko substansial bahawa perbicaraan adil tidak dapat diperolehi kerana saksi-saksi dan dokumen-dokumen relevan mungkin tidak dapat dikesan (lihat perenggan 20).]

Notes

For cases on defence, see 2(3) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 6342–6383.

Cases referred to

Vasudevan v T Damodaran & Anor [1981] 2 MLJ 150; [1981] CLJ (Rep) 101, FC (refd)

Appeal from: Civil Suit No 22–167 of 2008 (High Court, Kota Bharu)

Venkateswara (Syed Alwi, Ng & Co) for the plaintiff.
Mohd Rizwani (Rithauddeen & Aziz) for the respondent.

Abdul Malik Ishak JCA (delivering the ex tempore judgment of the court):

[1] This is an ex tempore judgment of this court.

[2] We shall refer the parties like what they were referred to at the High Court level.

[3] The first plaintiff is a sawmill company while the second plaintiff is the managing director of the first plaintiff.

[4] In 2003, the Kelantan Forestry Department received the first plaintiff's application to log timber in Hutan Simpan Kekal under the scheme known as 'Skim Intensif Kilang Papan Bumiputra'.

[5] In 2006, the first plaintiff obtained the final approval to log timber in an area indentified as 'Kompartmen 50, Hutan Simpan Kekal Gunung Stong Utara, Jeli, Kelantan'.

[6] By way of an oral agreement, the plaintiffs appointed the defendants as timber contractors for the said area. The first defendant gave a sum of RM100,000 to the plaintiffs as an advance payment.

[7] It must be borne in mind that the first defendant carried out a small business of his own. The second defendant, on the other hand, sold chicken rice. The third defendant was involved in the business of repairing, supplying and renting out office machine. But all the same, the defendants have remitted monies to the plaintiffs in cash and by way of cheques.

[8] The plaintiffs alleged that the defendants breached the oral contract when the defendants failed to adequately pay the guarantee sum as required and also failed to carry out initial works like building the entry road, the bridge and the workers' quarters.

[9] By July 2007, no logging activity was carried out because the logging licence had not been obtained. Eventually the approval to log timber at the designated area was cancelled. The first plaintiff's sawmill could not function as there was no timber to work on. With this sad state of affairs, the second plaintiff terminated the oral agreement with the defendants.

[10] The defendants applied pressure and even threatened the plaintiffs to sell 'Compartment 50' to them. This prompted the plaintiffs to file a writ of summons together with the statement of claim as seen at pp 17–33 of the appeal record at *Jilid* 1 seeking for the following reliefs:

(a) a declaration that the oral agreement be terminated;

(b) an injunction restraining the defendants or their agents from:

(i) disturbing the plaintiffs and the plaintiffs' workers;

(ii) entering the logging site at Compartment 50; and

(iii) interfering with the plaintiffs' affairs in applying or renewing for a timber licence;

(c) damages for breach of contract and economic loss.

[11] On 19 November 2008, the plaintiffs obtained an ex parte injunction and the injunction order was finally heard on an inter parte basis and it was granted on 5 October 2010.

[12] On 24 November 2008, the writ of summons together with the statement of claim were served onto the defendants.

[13] On 31 January 2011, after more than two years two months from the date of service of the writ of summons together with the statement of claim, the plaintiffs filed an application to record judgment in default of defence.

[14] On 15 March 2011, the defendants filed an application to extend time

to file their defence. The learned High Court judge heard the defendants' application on 1 August 2011 and dismissed it forthwith. It is pertinent to note that the defendants did not enclose a draft version of their statement of defence to support their application and this greatly militated against them.

[15] The defendants averred that it was an oversight (*tidak disengajakan*) on their part in not filing the statement of defence. This was also due to the fact that the parties were busy preparing for the hearing of the plaintiffs' injunction application. The defendants also averred that they had a defence on the merit and that the plaintiffs' claims revolved on cheating and outright suppression against the defendants.

[16] We are of the view that when the plaintiffs served the writ of summons together with the statement of claim onto the defendants on 24 November 2008, the defendants had time to file their defence and that would be on or before 8 December 2008. But the defendants did not file their defence and the delay was certainly unreasonable. In this context, we make reference to the Federal Court case of *Vasudevan v T Damodaran & Anor* [1981] 2 MLJ 150 at p 153; [1981] CLJ (Rep) 101, at p 107, where Eusoffe Abdoolcader J speaking for the Federal Court had this to say:

> The short answer to that in relation to the circumstances of the matter before us is the judgment of Lord Denning MR, in *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229, 245, 268 (at p 245):
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> > It was argued before us that the court should never, on the first application, dismiss the action. Even if there was long delay, the court should always give the dilatory solicitor one more chance. The order should be that the action should be dismissed 'unless' he takes the next step within a stated time. Such has been the practice, it was said, for a great many years. It was confirmed by Sir George Jessel MR, in *Eaton v Storer* (1882) 22 Ch D 91, 92 and it should not be changed without prior notice. I cannot accept this suggestion. If there were such a practice, there would be no sanction whatever against delay. The plaintiff's solicitor could put a case on one side as long as he pleased without fear of the consequences.
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> > If you read *Eaton v Storer* (1882) 22 Ch D 91, 92 carefully, it will be seen that the practice described by Sir George Jessei applies only to moderate delays of two or three months. It does not apply when 'there is some special circumstance such as excessive delay'. The principle on which we go is clear: when the delay is prolonged and inexcusable, and is such as to do grave injustice to one side or the other or to both, the court may in its discretion dismiss the action straightaway, leaving the plaintiff to his remedy against his own solicitor who has brought him to this plight.

[17] In our judgment, the defendants' application to extend time to file their

defence had prejudiced the plaintiffs. The delay of more than two years entailed hardship on the part of the plaintiffs. It was rightly argued that the plaintiffs had to incur losses and was a victim of circumstances. And the prejudice sustained by the plaintiffs cannot be compensated by costs. The first plaintiff's sawmill could not function as planned and was put on 'stand-by' in order to process the timber from Compartment 50 bearing in mind that one of the terms of the approval for logging was that 70% of the timber extracted from Compartment 50 should be processed at the first plaintiff's sawmill. The defendants' defaults in carrying out their part of the bargain had seriously undermined the first plaintiff's sawmill operations and escalated the costs of manpower.

[18] It was further argued that the defendants had threatened the second plaintiff and had attacked the second plaintiff physically. It was also argued that the defendants had bad mouthed the plaintiffs to such an extent that the Kelantan Forestry Department took steps to prevent the plaintiffs from obtaining the licence to log timber. There was also a police report alleging that the second plaintiff had cheated the defendants. All these had badly affected the reputation and image of the plaintiffs. The second plaintiff was worried about the safety of his family members as well as his workers at Compartment 50.

[19] It is the stand of the plaintiffs that all these cannot be compensated in monetary terms by the defendants. And to compound the matter further, it was argued that the defendants too could ill afford to pay compensation to the plaintiffs.

[20] It is our judgment, that if this appeal were to be allowed, it would certainly prejudice the plaintiffs and it would also be a waste of judicial time and effort and it would add up to the costs. There would also be the substantial risk that a fair trial could not be obtained bearing in mind that the relevant witnesses and documents may not be traced. Again, in this context, we once again refer to the case of *Vasudevan v T Damodaran & Anor* where His Lordship Eusoffe Abdoolcader J speaking for the Federal Court aptly said at p 107 to this effect:

> Turning now to the question of the delay giving rise to a substantial risk that a fair trial would not be possible or is such as is likely to cause or to have caused serious prejudice to the respondents. Both respondents claim that in the circumstances there is such a substantial risk and serious prejudice to them and we repeat that the prejudice is not only as between themselves and the appellant but also between each other or between themselves and third parties, and we have referred to the pleadings in this respect. The further and better particulars in respect of paras 1–4 of the statement of claim furnished to the first respondent all relate to events in 1964 pertaining to the oral agreement allegedly entered into, consents and the

nomination of a nominee and refer to persons named and present some 17 years ago. There is no certainty whether these persons referred to are still alive and if they are how sound their recollection of the events would be. On these counts both respondents would certainly be seriously prejudiced and as we have indicated the second respondent against whom the substantive relief is now being sought is also equally affected by any serious prejudice to the first respondent. The second respondent also avers that documentary evidence and accounts would not be kept for more than six years and further that as a housing developer it has not been able because of this action to develop the land which it had purchased solely for that purpose. We accordingly find there are substantial grounds for holding that the respondents have established the matter of a substantial risk of a fair trial not being possible after this long lapse of time and of serious prejudice as a result of the inordinate and inexcusable delay on the part of the appellant.

[21] For the reasons adumbrated in this short ex tempore judgment, we dismiss the appeal with costs of RM5,000 here and below. We affirm the decision of the High Court. Deposit should rightly go to the respondents plaintiffs.

Appeal dismissed with costs and decision of the High Court affirmed.

Reported by Ashok Kumar